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DAVID

ROBERT A.

Appellants,

DAVID M. K

Appellee.

Appeal From Supreme Court of Ohio.

BRIEF OF APPELLANTS UPON SUBMISSION UPON THESE APPEALS

GEORGE D. WELLER, *Toledo, Ohio,*
CRANEY DAVIS, *Toledo, Ohio,*
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Of Counsel.

IN THE

Supreme Court of the United States

No.....

CHARLES N. BEVAN,

Appellant,

vs.

DAVID M. KRIEGER, AS SHERIFF OF LUCAS COUNTY, OHIO,

Appellee.

No.....

JOHN W. KOEHRMAN,

Appellant,

vs.

DAVID M. KRIEGER, AS SHERIFF OF LUCAS COUNTY, OHIO,

Appellee.

No.....

ROBERT A. STRANAHAN,

Appellant,

vs.

DAVID M. KRIEGER, AS SHERIFF OF LUCAS COUNTY, OHIO,

Appellee.

Appeals From Supreme Court of Ohio

BRIEF OF APPELLANTS UPON JURISDICTION UPON THESE APPEALS

GEORGE D. WELLES, *Toledo, Ohio,*
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TABLE OF CONTENTS

		Page
I	Opinion of Supreme Court of Ohio	3
II	Nature of the Case	3
III	The Federal Questions Presented by These Appeals Are Substantial and the Appeals Should Be Heard on Their Merits	5
	A. Statement of the Questions	6
	B. Summary of Ohio Law and Decisions	9
	C. The Ohio Statutes in Question Deny Due Process of Law	10
	D. The Federal Questions Were Properly Presented to the Court Below	12
	E. Statutes of Other States	13
IV	Conclusion	15
Appendix A		17

AUTHORITIES CITED

Burns vs. Superior Court of the City and County of San Francisco, 140 Calif. 1, 73 Pac. 597, 602 (1903) 14

Callan vs. Wilson, 127 U. S. 540, 554 (1888) 10

Coe vs. Armour Fertilizer Works, 237 U. S. 413, 423-425 (1915) 10, 11

DeCamp vs. Archibald, 50 O. S. 618 (1893) 9

Fiske vs. Kansas, 274 U. S. 380, 385 (1927) 12

George Sage, In re, 24 O. C. C. (N.S.) 7 (1915) 12

Goode, In re, 16 Ohio Decisions, (N. P.) 404 (1905) .. 9

Huron, In re, 50 Kan. 152, 48 Pac. 574 (1897) 14

Hurtado vs. California, 110 U. S. 516 (1883) 10

Interstate Commerce Commission vs. Brimson, 154 U. S. 447 (1894) 15

Page

Jennings, Ex Parte, 60 O. S. 319 (1899)..... 9
Kilbourn vs. Thompson, 103 U. S. 168 (1880)..... 15
Louisville Trust Co. vs. Comminger, 184 U. S. 18 (1902)..... 10
Louisville & Nashville Railroad Company vs. Melton, 218 U. S. 36, 49 (1910)..... 6
Mallinckrodt Chemical Works vs. State of Missouri, at the Relation of Jones, Circuit Attorney of the City of St. Louis, 238 U. S. 41, 49 (1915)..... 12
Mason, In re, 43 Fed. 510 (D. C., Minn., 1890)..... 15
McGrain vs. Daugherty, 273 U. S. 135 (1927)..... 12
Meyers et al. vs. Shields, County Treasurer, 61 Fed. 713, 724 (C. C., N. D. Ohio, 1894).....10, 11
Miedreich vs. Lauenstein, 232 U. S. 236, 243 (1914).. 12
Milheim et al. vs. Moffatt Tunnel Improvement District et al., 262 U. S. 710, 716-717 (1923)..... 6
Noell, Ex Parte, 293 S. W. 488 (St. Louis, Mo., Court of Appeals, 1927)..... 14
Pennoyer vs. Neff, 95 U. S. 714, 732 (1877)..... 10
People ex rel. McDonald vs. Leubuscher et al., 54 N. Y. S. 869, 34 App. Div. 577 (1898).....10, 14
Schoepf, Ex Parte, 74 O. S. 1 (1906)..... 9
Sims, In re, 54 Kan. 1, 37 Pac. 135, 136 (1894)..... 14
Tumey vs. Ohio, 273 U. S. 510 (1926).....8, 11
Twining vs. New Jersey, 211 U. S. 78, 101 (1908)... 10
Wales vs. Whitney, Secretary of the Navy, 114 U. S. 564 (1885), pp. 571, 572..... 4
Ward Baking Co. et al. vs. Western Union Telegraph Co. et al., 200 N. Y. S. 865, 205 App. Div. 723 (1923)..... 14
Ziebold, In re, 23 Fed. 791 (C. C. D. Kan., 1885).... 14

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DAVID M. KRIEGER, AS SHERIFF OF LUCAS COUNTY, OHIO,

Appellee.

BRIEF OF APPELLANTS UPON JURISDICTION UPON THESE APPEALS

The questions now under consideration are substantially the same in all three cases and one brief will suffice to present them.

The "Appellee's Statement Making Against the Jurisdiction Asserted by Appellant," filed in each case, is directed only to the point that the appellate jurisdiction of this Court should not be exercised because, as it is claimed, the appeals are for delay only and the questions involved are frivolous.

What is styled by the appellee as "Appellee's Statement Making Against Jurisdiction Asserted by Appellant" seems in substance and in fact to be (1) a statement making against jurisdiction, (2) a motion to dismiss the appeal, and (3) a brief in support of such motion. In each statement is the language, "We respectfully submit that this court should decline jurisdiction of this appeal upon the following grounds" (p. 5 a, Bevan; p. 6, Koehrman and Stranahan); and each statement concludes by submitting "that the record presents no substantial federal question which would warrant this court in taking jurisdiction and that the appeal has been taken for delay to frustrate the exercise of valuable rights by the Common Pleas plaintiff" (p. 15, Bevan; p. 16, Koehrman and Stranahan).

If motions to dismiss or affirm had been filed by the appellee the appellants would have had the right to file a reply brief under Rule 7, paragraph 3 of this Court. That right, we take it, does not depend upon the title by which an appellee designates the document which he files; and if the appellee's "Statements" in the present cases are to be considered by the Court as motions to dismiss, we assume that the Court will permit us thus to present our theory of the case and our views as to the law applicable thereto.

I

THE OPINION OF THE SUPREME COURT OF OHIO

The opinion of the Supreme Court of Ohio in these cases is officially reported as *Ex Parte C. N. Bevan, Ex Parte John W. Koehrman* and *Ex Parte Robert A. Stranahan*, 126 O. S. 126, and is set forth in full as Appendix A hereto.

II

THE NATURE OF THE CASE

It is unnecessary to restate here the nature of the cases, which already appears in the appellants' statements of the basis on which they contend that this Court has jurisdiction. We shall, however, note a few claims made in appellee's statements which are erroneous or misleading.

The appellee's claim that the notary was employed by appellants, or by both parties, rests solely upon the fact that after the plaintiff in the Common Pleas Court had employed him, the appellants requested him to furnish and paid for a transcript of the proceedings before him, which transcript formed part of his order of commitment of the appellant, C. N. Bevan, the entire order being attached as an exhibit to Bevan's "petition for a writ of *habeas corpus.*" The selection and employment of the notary and control of proceedings before him were by the plaintiff in the Common Pleas Court, the appellants merely securing copies of the proceedings had at the plaintiff's instigation.

While the order of commitment of the appellant, C. N. Bevan, formally recited that the notary adjudged that the questions asked and books, papers and documents demanded "are material to the issues in said cause" (in the Common Pleas Court), the notary himself testified, as shown by the Bevan record (p. 183), and it is undisputed that he did not in fact undertake to form a judgment upon the question of materiality but merely signed the order of commitment prepared and presented to him by the plaintiff's attorneys. Further, under the decision of the Supreme Court of Ohio in these very cases, the notary had no power or jurisdiction to make any such adjudication.

The reference to a "technical arrest" is probably intended to indicate that immediately after the arrests of the appellants they were liberated under bond by the orders of the Court of Appeals of Lucas County, Ohio, made after appellants had filed their respective "petitions for a writ of *habeas corpus.*" The returns of the appellee himself show that appellants were actually arrested; and except for their subsequent enlargement by the court, they would have continued in the appellee's custody. These cases are within the class referred to in *Wales vs. Whitney, Secretary of the Navy,* 114 U. S. 564 (1885), pp. 571, 572, "in which a sheriff or other officer, with a writ in his hands for the arrest of a person whom he is required to take into custody, to whom the person arrested submits without force being applied. * * * The officer has the authority to arrest and the power to enforce it."

Appellee stresses the fact that *certiorari* was denied by this court in proceedings brought by these ap-

pellants, *C. N. Bevan, John W. Koehrman and Robert A. Stranahan against Gilson D. Light, as Sheriff of Lucas County, Ohio,* as respondent and appellee (Cases numbered 500, 501 and 502). They failed however to point out that the cases turned only upon the question whether the Federal courts had or should exercise jurisdiction in *habeas corpus* proceedings brought by these appellants because of the pendency of similar proceedings in the Supreme Court of Ohio and because, as it was claimed, the exercise of Federal jurisdiction might interfere with the determination of the questions by the state court. The merits of the cases were not passed upon either by the District Court, in which the proceedings were instituted, nor by the Circuit Court of Appeals for the Sixth Circuit.

III

THE FEDERAL QUESTIONS PRESENTED BY THESE APPEALS ARE SUBSTANTIAL AND THE APPEALS SHOULD BE HEARD ON THEIR MERITS.

Rather than reply in detail to the appellee's erroneous statement of the questions involved, we prefer, for the sake of brevity, to state the questions and our contentions as they actually are. We shall not, however, attempt any full discussion of their merits, which we conceive to be premature at this time, the only inquiry now being whether there is color of support for the Federal questions, and not whether, upon analysis and exposition, they may eventually be found to be unsound.

Louisville & Nashville Railroad Company vs. Melton, 218 U. S. 36, 49 (1910); *Milheim et al. vs. Moffatt Tunnel Improvement District et al.*, 262 U. S. 710, 716-717 (1923).

It will be seen that the questions are quite different from those posed by the appellee and that they do not depend upon any supposed necessity for the separation of powers between the executive, legislative and judicial departments of the state. Nor is it important, on the question of due process, whether the remedy provided for by Ohio General Code Section 11514 be *habeas corpus*, an action in the nature of *habeas corpus*, or otherwise, for whatever be the character of this remedy *hearing and relief can be had only after imprisonment.*

A. Statement of the Questions

The appellants maintain:

1. That Ohio General Code Sections 11510, 11511 and 11512, as well as the operation of such sections and each of them as applied to the facts in these cases, deny the appellants due process of law and are unconstitutional and void under Section 1 of the Fourteenth Amendment to the Constitution of the United States, for the reason that such sections as construed by the Supreme Court of Ohio, while providing that a witness summoned to testify before a notary public in the course of the taking of depositions for use in a civil action pending in a state court may *lawfully* refuse to give evidence not pertinent to the issues made or tendered by the pleadings, none the less purport to authorize and empower such notary public at will to commit and im-

prison such witness for contempt in failing or refusing to answer questions or to adduce the evidence demanded, without conferring upon such notary public (who is a mere ministerial or executive officer), *or upon any judicial tribunal*, the power to hear and determine *before the commitment and imprisonment of the witness* the question of the lawfulness of the refusal and the consequent guilt or innocence of the witness of the alleged contempt, the only opportunity for a judicial hearing and determination of the guilt or innocence of the witness so imprisoned being an independent collateral action brought by the witness *after his imprisonment*, in which action he assumes the burden.

2. That the unconstitutionality of Ohio General Code Sections 11510, 11511 and 11512, as well as the unconstitutional operation of such sections and each of them as applied to the facts in these cases, is not cured by the remedy provided for in Ohio General Code Section 11514, for the reason that, whether the remedy afforded by Section 11514 be *habeas corpus*, an action in the nature of *habeas corpus*, or otherwise, by the terms of Section 11514, such remedy can be invoked only *after the witness has been imprisoned by order of the notary public without any hearing or determination as to his guilt or innocence of the alleged contempt*. Moreover, in invoking such remedy the witness must assume the burden of showing that the imprisonment was unlawful.

3. That Ohio General Code, Sections 11510, 11511 and 11512, as well as the operation of such sections and each of them as applied to the facts in these cases, deny the appellants due process of law and are unconstitu-

tional and void under Section 1 of the Fourteenth Amendment to the Constitution of the United States for the reason that no opportunity is afforded by said sections or by the law of Ohio, for submitting fundamental questions arising under the Constitution of the United States and as to the jurisdiction of the notary public to the determination of a competent judicial tribunal before the witness is declared to be guilty of contempt and imprisoned upon the order of the notary public.

4. That Ohio General Code, Sections 11510, 11511 and 11512, as well as the operation of said sections and each of them as applied to the facts in these cases, deny the appellants due process of law and are unconstitutional and void under Section 1 of the Fourteenth Amendment to the Constitution of the United States, in that said sections purport to authorize and permit the imprisonment and arrest of the appellants upon the order of a notary public, who, *as was the fact in these cases*, was selected and employed by, and the continuance of whose employment was at the will of, the party seeking to take depositions for use in a civil action pending in a state court, the compensation of such notary public being by law directly governed by the extent of the evidence the witness might be required to give, the notary public, therefore, having such a direct, substantial, personal pecuniary interest in the taking of the deposition and coercing the appellants to testify as to disqualify such notary public, were he otherwise empowered and qualified so to do, from hearing and determining whether the appellants' refusal to adduce the evidence demanded was unlawful and whether the appellants were guilty of contempt. *Tumey vs. Ohio*, 273 U. S. 510 (1926).

5. In the cases of the appellants Bevan and Koehrman, it is also maintained that the subpoena *duces tecum* served upon these appellants were so broad and sweeping in their terms as to constitute an unreasonable search and seizure in violation of Section 1 of the Fourteenth Amendment to the Federal Constitution.

B. Summary of Ohio Law and Decisions

Under Ohio General Code Section 11510 a witness may be punished only for an *unlawful refusal* to answer or to produce documents. A refusal is not unlawful if the evidence sought is not material or relevant to any issue in the case; *Ex Parte Jennings*, 60 O. S. 319 (1899); *Ex Parte Schoepf*, 74 O. S. 1 (1906). But the notary cannot either sustain or overrule any objection, nor determine the legal question (*i. e.*, the materiality or relevancy *for any purpose*) upon which the lawfulness of the refusal depends, *DeCamp vs. Archibald*, 50 O. S. 618 (1893); *Ex Parte Jennings, supra; Ex Parte Schoepf, supra*, p. 10, and the witness refuses to answer at his own peril, and notwithstanding that the notary cannot determine the lawfulness of the refusal, "his only recourse is to commit the witness to jail," as for an unlawful refusal, "leaving to a court of competent jurisdiction the determination of the question of relevancy upon application for release by *habeas corpus*." *In re Goode*, 16 Ohio Decisions (N.P.) 404 (1905).

So wholly devoid is the notary of any power to hear and determine anything, that in the instant cases the Supreme Court of Ohio strongly intimates, without expressly so holding, that the notary may have no right to

refuse commitment in any case at the request of counsel, and may in fact be required to commit a witness whenever counsel directs; a construction fairly epitomizing the actual operation of the statute, which would reduce the notary's function to that of a rubber stamp in the hands of counsel, vesting in them, in fact, the real power of commitment.

C. The Ohio Statutes in Question Deny Due Process of Law

Due process of law requires notice and an opportunity to be heard by a competent judicial tribunal, whether it be a court or an officer vested with jurisdiction to hear and determine, *before commitment*. *Pennoyer vs. Neff*, 95 U. S. 714, 732 (1877); *Hurtado vs. California*, 110 U. S. 516 (1883); *Louisville Trust Co. vs. Comminger*, 184 U. S. 18 (1902); *Twining vs. New Jersey*, 211 U. S. 78, 101 (1908); *Coe vs. Armour Fertilizer Works*, 237 U. S. 413, 423-425 (1915).

Relief *after* imprisonment, whether it be by *habeas corpus* or by an application for discharge under Ohio General Code 11514, will not satisfy due process of law. *Coe vs. Armour Fertilizer Works, supra; Pennoyer vs. Neff, supra; Meyers et al. vs. Shields, County Treasurer*, 61 Fed. 713, 724 (C. C., N. D. Ohio, 1894); *People ex rel. McDonald vs. Leubuscher et al.*, 54 N. Y. S. 869, 34 App. Div. 577 (1898); *Callan vs. Wilson*, 127 U. S. 540, 554 (1888); and it is no answer, to one who protests against deprivation of liberty or property without due process of law, to say that in his particular case due process of

law would have led to the same result because he had no adequate defense on the merits. *Coe vs. Armour Fertilizer Works, supra.*

These cases are not within the class of proceedings where summary action without notice or hearing and postponement of judicial inquiry are permissible. Summary action and postponement of judicial inquiry constitute due process of law only in the assertion of the rights of the public against the property of the individual in the exercise of the public police power or the imposition of burdens upon his property for the public use where the nature of the subject-matter requires summary action, as, for instance, in matters of taxation, revenue and the exercise of the power of eminent domain.

In these cases the notary public, assuming that the statutes confer upon him the jurisdiction to hear and determine the subject matter, was disqualified to make any order against the appellants because he was selected and employed by, and the continuance of his employment was at the will of, the parties seeking to take the deposition, and the amount of his compensation was directly dependent upon the length of the depositions and the number of writings to be copied therein. *Tumey vs. Ohio,* 273 U. S. 510 (1927). The *Tumey* case reached this Court by writ of error to the judgment of the Supreme Court of Ohio. See also *Meyers et al. vs. Shields, County Treasurer, supra.* In this connection it should be kept in mind that the vice here complained of results from the normal operation of the statute claimed to be unconstitutional.

D. The Federal Questions Were Properly Presented to the Court Below

All of the Federal questions presented by these appeals were properly presented to the Supreme Court of Ohio in accordance with the state practice and were actually considered and determined by that court. This Court will therefore regard the questions as duly made. *Miedreich vs. Lauenstein*, 232 U. S. 236, 243 (1914); *Mallinckrodt Chemical Works vs. State of Missouri at the Relation of Jones, Circuit Attorney of the City of St. Louis*, 238 U. S. 41, 49 (1915). Furthermore, the right of the appellants Koehrman and Stranahan, who declined to obey the subpoenas, to question the constitutionality of the state statutes involved and the qualifications of the notary is supported by *McGrain vs. Daugherty*, 273 U. S. 135 (1927); and the procedure employed was sanctioned by *In re George Sage*, 24 O. C. C. (N.S.) 7 (1915).

There being substantial questions as to the validity of the state statutes themselves, it is not important whether the question of their operation as applied to the facts of these cases should be reviewed as on appeal or as upon *certiorari*. Where the case concerns the misapplication of a statute by an officer, contrary to its terms and intent, the review is doubtless by *certiorari;* but where it is claimed that the statute is invalid as operating on or applied to a particular case, the question is properly reviewable on appeal. *Fiske vs. Kansas*, 274 U. S. 380, 385 (1927).

We know of no decision of this Court, and have been cited to none, that forecloses the present contentions ex-

plicitly or otherwise. In fact the reasoning of the decisions of this Court clearly supports them.

E. Statutes of Other States

The mere existence in other states of statutes similar to these now under consideration, without any authoritative decisions as to their validity, is not persuasive; but since counsel for appellee seem to consider their existence important, we shall refer to them briefly.

The statutes of Nevada, Oregon, Utah, Arkansas, Louisiana and New Hampshire confer no authority upon officers taking depositions to commit witnesses for refusal to testify, as do the Ohio statutes, the only authority given being to compel their attendance.

The Arkansas statutes apparently constitute the notary a judicial officer, empowering him to decide summarily all objections to questions, to prevent misleading questions and to stop an unreasonable or vexatious course of interrogation, none of which power is vested in notaries under the Ohio statutes.

In Florida an examination of witnesses before trial appears to be pursuant to order of court upon the propounding of written interrogatories and is had before two commissioners, one of whom is appointed by each of the parties. They may commit for refusal to testify only by joint action.

Under the Iowa statute the power of punishment for contempt is vested only in judicial officers so that if notaries in the taking of depositions possess that power, which is not clear, it is because they are in that state vested with judicial power.

Only in the states of Kansas, Nebraska and Missouri has the constitutionality of the other statutes referred to in appellee's statement been passed upon so far as we can find.

In Kansas like statutes purporting to authorize commitment by the notary were held unconstitutional. *In re Huron,* 58 Kan. 152, 48 Pac. 574 (1897).

In Missouri the question of due process involved in the present case was not before the court. The Missouri statute was upheld on the ground that in the taking of depositions the notary public under the Missouri law acted judicially, as a judicial officer. *Ex Parte Noell,* 293 S. W. 488 (St. Louis, Missouri, Court of Appeals, 1927). The reasoning of that case certainly lends no support to the conclusion reached by the Ohio Supreme Court.

California also has statutes very similar to those of Ohio, and the section authorizing commitment was held unconstitutional in *Burns vs. Superior Court of the City and County of San Francisco,* 140 Calif. 1, 73 Pac. 597, 602 (1903).

A statute of the State of New York similar in principle and involving the same vice was considered and held unconstitutional in *People ex rel. McDonald vs. Leubuscher et al., supra.*

A statute authorizing the attorney general to summon witnesses and to imprison was held unconstitutional in *Ward Baking Co. et al. vs. Western Union Telegraph Co. et al.,* 200 N. Y. S. 865, 205 App. Div. 723 (1923), and Kansas statutes conferring similar powers upon a county attorney were also held unconstitutional in *In re Ziebold,* 23 Fed. 791 (C. C., D. Kan., 1885), and *In re Sims,* 54 Kan. 1, 37 Pac. 135, 136 (1894).

See also *Interstate Commerce Commission vs. Brimson*, 154 U. S. 447 (1894); *Kilbourn vs. Thompson*, 103 U. S. 168 (1880); *In re Mason*, 43 Fed. 510 (D. C., Minn., 1890).

It will thus be seen that no other state court has yet accepted the extreme position taken by the Supreme Court of Ohio.

IV. CONCLUSION

We submit that the questions involved are neither frivolous nor foreclosed by any decision of this Court but are substantial and should be considered on their merits. We also submit that an examination of the record in this case and also of the *certiorari* proceedings in this Court which were brought by these appellants and are referred to above and in appellee's statements, will show that these appellants instead of trying to prolong or delay the proceedings have from first to last acted with the utmost expedition and have prosecuted the proceedings which they instituted with all the speed and diligence which the mere mechanical requirements of appellate procedure permit and have not sought delay at any time.

Respectfully

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APPENDIX A

Ex parte C. N. Bevan
Ex parte John W. Koehrman
Ex parte Robert A. Stranahan

1. Judicial power is not exercised by a notary public, during the taking of depositions, in committing to jail witnesses who refuse to answer questions, and in attaching and committing to jail witnesses who disobey the order of their subpoena.

2. The general assembly did not violate any provision of the federal or state constitution in the enactment of Sections 11510, 11511 and 11512, General Code, in delegating such power to notaries public. (DeCamp v. Archibald, 50 Ohio St., 618, and Benckenstein v. Schott, 92 Ohio St., 29, approved and followed.)

3. A witness committed by a notary public, under Sections 11510, 11511 and 11512, General Code, has his remedy under Section 11514, General Code, and is not denied due process of law. Where the witness is a party and is being examined as upon cross-examination under the statute, the further right to test the relevancy or competency of the questions and to demand his privilege, is preserved to him in the trial court.

4. The right of a party to an action to examine the adverse party as upon cross-examination under Section 11497, General Code, vests as soon as summons is served on such party as provided by Section 11526, General Code. The fact that a co-defendant has not been served with summons, does not furnish any reason why the party served should not submit to such examination, since the party plaintiff may proceed under Section 11299, General Code.

5. No ground for refusal to appear before a notary public and testify, is afforded officers of a corporation by the fact that the petition in the action, in which it is sought to take the depositions of such officers as upon cross-examination, is

claimed to be demurrable, or that the action was not brought within the time provided by law, or that a party plaintiff has been guilty of laches.

6. The claim that a notary public has such an interest in the taking of depositions as disqualifies him to act, is untenable, and the case of Tumey v. Ohio, 273 U. S., 510, has no application whatever.

7. In an action charging fraudulent conspiracy by the officers of a corporation, because of the tendency toward liberality in cases of this character, the range of the testimony is wide, and subpoenas *duces tecum*, which command that the entire correspondence file, records and documents of such corporation for many years back, be produced before the notary public by the officers of the corporation, to be used in connection with the giving of their depositions as upon cross-examination, are not so broad and sweeping as to be violative of due process, and do not constitute unreasonable searches and seizures.

8. When a personal representative of a decedent's estate refuses to bring an action for the collection of assets, an heir, legatee or devisee may bring the action and make such personal representative a party defendant.

(Nos. 23652, 23653 and 23654—Decided January 25, 1933.)

Error to the Court of Appeals of Lucas County.

These are proceedings in error to review the respective judgments of the Court of Appeals of Lucas county, Ohio, made and entered in the above-entitled cases. An intelligent consideration of the issues involved necessitates a comprehensive statement. In order to make it comprehensive, some time and much space have been consumed.

These judgments respectively deny original applications by the plaintiffs in error for discharge from the custody of the sheriff of Lucas county. The plaintiff

in error, C. N. Bevan, was held under a commitment issued by a notary public for his refusal to answer material questions, refusal to answer any further questions of any character, and refusal to produce material books or records, pursuant to a subpoena *duces tecum*, in the course of the taking of his deposition in the suit of *Clara Sielcken-Schwarz v. The Woolson Spice Company et al.*, pending in the Common Pleas Court of Lucas county. The plaintiffs in error, John W. Koehrman and Robert A. Stranahan, had respectively been arrested under attachments issued by the same notary, upon their refusal to appear and give their depositions in the same case, in response to subpoenas personally served upon them.

The material facts are as follows: On June 2, 1932, Clara Sielcken-Schwarz, as widow and sole residuary legatee of the late Hermann Sielcken, filed her petition in the common pleas court of Lucas county, Ohio, against the Woolson Spice Company, an Ohio corporation, of which the plaintiff in error, C. N. Bevan, is secretary and treasurer; against plaintiffs in error, John W. Koehrman and Robert A. Stranahan; against Franklin H. Biggs, Marion M. Miller and Frank D. Stranahan; against Ammi F. Mitchell and Leroy E. Eastman, as administrators of the estate of William Brigham, deceased; and against the Irving Trust Company, a foreign corporation, as executor of the last will and testament of Hermann Sielcken, deceased.

The petition charges that the defendants Koehrman and Biggs and said Brigham fraudulently conspired together to take advantage of the absence in Germany of Sielcken (president and controlling stockholder of the

Woolson Company), where he had gone on the business of the company, and where he had been detained by his last illness and the exigencies of the World War, to oust Sielcken as president, and to wrongfully acquire control of the corporation and manipulate and exploit it in their own interests; that thereafter said Koehrman, Biggs and Brigham, in association with Robert A. Stranahan and Frank Stranahan, aided and abetted by the Woolson Spice Company, fraudulently conspired together to acquire for a grossly inadequate price the stock formerly held by Sielcken and then held by his estate; that the fraudulent conspiracy was carried on by such individual defendants, taking advantage of the control of the corporation, wrongfully acquired by them, to misrepresent the financial condition, business and prospects of the Woolson Company; that such fraudulent misrepresentations were communicated to the executor, and to all prospective purchasers of the stock; and that as a result of this wrongful and fraudulent conspiracy the individual defendants, aided and abetted by the Woolson Spice Company, obtained the stock of the Sielcken estate for a grossly inadequate price.

The petition asks to have the stock so obtained restored to the estate, together with all dividends paid thereon since its fraudulent conversion.

The petition alleges that the fraud was not discovered by the plaintiff, sole residuary legatee, until 1931, and was not discovered by the executor prior to that time. The petition further sets forth that since the executor has failed and refused to bring the suit on request of the plaintiff, such executor is therefore joined as a party defendant.

On the same day the petition was filed, summons was duly issued and served upon all of the defendants except Marion M. Miller, who could not be found within the county and who has not been served. On the same day, after service of summons, notice to take depositions on June 6, 1932, was served on the Common Pleas defendants and subpoenas *duces tecum* were served on the witnesses, Koehrman and Bevan. No proceedings were had on this notice because prior to June 6th counsel for the Common Pleas plaintiff were served with a motion to quash the notice to take depositions and the subpoenas *duces tecum*, and to enjoin the taking of depositions. This motion came on for hearing before the Common Pleas Court of Lucas County, Ohio, on June 6, 1932, and, at the suggestion of the court an agreement was reached between counsel for the Common Pleas plaintiff and chief counsel for the Common Pleas defendants, and for these plaintiffs in error, that the taking of depositions should be postponed until June 13th. Pursuant to that agreement new notices to take depositions on June 13th were served on the Common Pleas defendants, subpoenas *duces tecum* upon the plaintiffs in error Bevan and Koehrman, and ordinary subpoenas upon the plaintiff in error Robert A. Stranahan and upon Frank Stranahan.

At 9:30 a.m., on June 13th, the hour fixed for taking the depositions, the witness Bevan appeared, but without any of the books and papers called for in his subpoena. The witnesses, Koehrman and Stranahan, disregarded their subpoenas and failed to appear. On the failure of three of the witnesses summoned to appear and the failure of the witness, Bevan, to make any com-

pliance with his subpoena *duces tecum,* the notary adjourned the hearing until 2:00 p.m., of the same day, and ordered Bevan to produce at that time the books and records described in his subpoena. Prior to this adjourned time for the taking of these depositions, a supplemental motion to quash the new notices and subpoenas, and to enjoin the taking of depositions in the Common Pleas suit was filed in the Common Pleas Court. At 2:00 p.m., on June 13th, being the time to which the taking of the depositions had been adjourned, Koehrman and Stranahan again failed to appear. Bevan appeared and was duly sworn and proceeded to answer a few questions as to his name and occupation. He was then asked a series of questions, subsequently found to be material by the Court of Appeals for Lucas county, Ohio, and in each instance, upon being ordered to answer by the notary, he refused to do so, making no claim of privilege, and giving as his only reason that he was advised by counsel not to answer. Bevan also refused to produce any of the books, records or documents required by his subpoena *duces tecum.* Finally Bevan stated that he would answer no further questions of any kind or character whatsoever, and he again refused to produce any of the books, records or documents described in his subpoena *duces tecum.*

Thereupon the notary adjudged that said questions were material, and that said books, papers and documents were material and properly described, and issued to the sheriff of Lucas county, Ohio, a commitment directing him to arrest and commit the said witness to the county jail until he should testify. The witnesses Koehrman and Stranahan having failed and refused to appear in

obedience to their subpoenas, the notary issued writs of attachment for each of them, commanding the sheriff of Lucas county, Ohio, to attach each of them and bring them before the notary forthwith "as well to answer the State of Ohio for said contempt in disobeying said subpoena as to give his testimony in the action."

No arrests were made under the commitment or writs until 9:10 a.m., on June 14th, at which time the sheriff's office was advised by counsel for the plaintiffs in error that Bevan, Koehrman and Robert A. Stranahan were then in the Lucas county courthouse, ready to be arrested. A technical arrest was then made, and three applications for discharge from illegal imprisonment or petitions for writs of *habeas corpus*, were immediately filed with the Court of Appeals of Lucas county, Ohio. The applications or writs were granted at once, before the sheriff had an opportunity to produce the witnesses Koehrman and Stranahan before the notary, and all were immediately released on their own recognizances, pending hearings on their applications or petitions.

Thereupon counsel for the plaintiffs in error and common pleas defendants dismissed without prejudice, and without any hearing, the motion and supplemental motion to enjoin the taking of depositions in the suit which had been filed in the common pleas court.

On the morning of June 15, 1932, the plaintiffs in error filed in the Court of Appeals of Lucas county, Ohio, amendments to their respective applications or petitions, in which they raised the constitutional questions now sought to be brought before this court.

The original applications or petitions, and the amended applications or petitions, were heard by the

Court of Appeals of Lucas county on June 15th and 16th, and after hearing all evidence offered by counsel on the legality of the restraint of the respective witnesses, lengthy arguments of counsel, and the submission of briefs, that court on June 21, 1932, held that the Common Pleas plaintiff was entitled to take the depositions of these witnesses at once; that the subpoenas *duces tecum* called for material, books and papers and were not too broad; that the questions asked the witness Bevan were material; that he was guilty of contempt for refusing to produce the books and papers; and that the witnesses Koehrman and Stranahan were legally attached for disobeying their subpoenas.

On June 22nd the Court of Appeals for Lucas county, Ohio, ordered the applications dismissed and the applicants remanded to the custody of the sheriff of Lucas county. On the same day motions for a new trial in the Court of Appeals of Lucas county were overruled. Petitions in error were at once filed in this court by plaintiffs in error, and on June 25th respective applications for stays of execution were addressed to Judge Kinkade of this court. After a full hearing, Judge Kinkade overruled the applications. Similar applications were presented to the Court of Appeals of Lucas county on June 27th, and on June 29th these applications for stays were likewise overruled by that court.

Messrs. Tracy, Chapman & Welles, Messrs. Marshall, Melhorn, Marlar & Martin, Mr. Harry S. Bugbee, Mr. Stuart S. Wall, Mr. Crary Davis and Mr. Thomas J. Lynch, for plaintiffs in error.

Messrs. Baker, Hostetler, Sidlo & Patterson, and Messrs. Fraser, Hiett, Wall & Effler, for defendant in error.

Stephenson, J. These three cases were consolidated and submitted together, as the same alleged controlling questions arise in each case. There will be no further statement of fact in this opinion, other than is absolutely necessary in order to apply the law, as the court interprets it.

It is assumed that the depositions in question were being taken before a regularly appointed notary public in pursuance of notice as provided by statute, as no question was raised along these lines.

Stranahan was served with an ordinary subpoena and Bevan and Koehrman were served with subpoenas *duces tecum.*

No complaint is made as to the service of the subpoenas. It is contended that the subpoenas *duces tecum* "were so broad and sweeping in their terms as to be violative of due process and to constitute unreasonable searches, and seizures, in addition to calling for incompetent and immaterial evidence."

As bearing upon this particular phase of the case, *it is significant* that no question of privilege was raised.

Stranahan and Koehrman disobeyed the order of their subpoenas and failed to appear. Bevan appeared, was sworn, answered the preliminary questions as to name and residence, refused to answer further questions, and refused to produce any of the books, records and documents described in his subpoena *duces tecum,* giving as his reason therefor that he "was acting upon the advice of counsel," which, of itself, in a case of this character, is no reason at all. Attachments were issued and served on Stranahan and Koehrman. Brushing aside the preliminary proceedings, all three of them were arrested

and committed to jail until they "should testify." Thereupon applications were made to the Court of Appeals for their release. It would be of little moment whether the application was made under favor of Section 11514, General Code of Ohio, or whether it was in the form of *habeas corpus,* except that the United States Circuit Court of Appeals of the Sixth Circuit has held substantially that this statute provides a method for judicial review of the action of the notary. *Bevan v. Light, Sheriff,* (C. C. A.), 61 F. (2d), 1019.

The Court of Appeals heard the applications of all three, dismissed their petitions and they were thereupon automatically remanded to the custody of the sheriff of Lucas county; and this court is asked, in this proceeding, to reverse the Court of Appeals and discharge plaintiffs in error from custody.

Practically all the statutes empowering notaries public to take depositions and commit any one violating their lawful orders, are attacked.

The administration of justice would be seriously impeded had not the General Assembly made some provision for the taking of depositions. As a part of the instrumentality for taking depositions, the Legislature created the office of notary public and made it appointive. There was reason for this enactment. A notary public, above all officers, should not be under any obligation to the electorate of his county. A notary public is appointed by the governor, on the certificate of the common pleas judge of the county for which he is appointed, which judge must have personal knowledge of his good moral character and his ability to perform the duties of the

office, or ascertain same by an examination prescribed by the rules of court.

No requirement as to fitness is required of a justice of the peace. If the individual who is a candidate for the office of justice of the peace in his township secures the greater number of votes, he is justice of the peace, regardless of fitness, and he is a judicial officer with power to "hear and determine" and undoubtedly with power to commit for contempt of his court.

Can it be said that the Legislature has no authority to delegate the power to commit to a notary public, notwithstanding his fitness, just because he has no power to "hear and determine?"

Our forebears, with uncanny wisdom, gave us the legislative, executive and judicial functions of government, and intended that they should operate as "checks and balances." During our formative period, the courts, federal and state, viewed with jealousy any attempt on the part of Congress or a state Legislature to delegate the powers inherent in one branch of government to another. Our rapid expansion made necessary the creation of many new offices and they were created, probably too many of them; but had not the courts relaxed to some extent the rule requiring the powers of government to be kept sacredly separate, we would have had many more of them.

It would not be necessary to go beyond the confines of Ohio to find scores of instances wherein one branch of government has been invested with the powers of another. This departure had to be made as a matter of public exigency.

A notary public is a ministerial officer, as that term has been understood so long that "the memory of man runneth not to the contrary." Some worth-while authorities insist that the word "ministerial" means nothing, as applied to an officer—that our officers are legislative, executive and judicial. Under this strict nomenclature we must hold that a notary public is an executive officer, clothed with such power as the Legislature, within its constitutional limitations, saw fit to delegate to him.

Is the power to commit, delegated to notaries public, a judicial function? We think not. It is so circumscribed by legislative enactment that there is little room remaining within which to exercise the only judicial function, if it by any stretch of the imagination could be called a judicial function, whether he will or will not commit.

That is not all. We are not so sure that the section under which commitment by a notary is authorized is not a mandatory statute, notwithstanding the language used is directory.

Section 11512, General Code, provides that the notary "may fine" or "may imprison" for disobedience of the order of a subpoena or refusal to testify. While language is helpful in determining whether a statute is mandatory or directory, it is by no means conclusive. The true test is the legislative intent. What is the purpose of the statute? What did the Legislature intend that it should accomplish?

The purpose of depositions is threefold: First, to obtain the testimony of witnesses beyond the jurisdiction of the court; second, to perpetuate testimony, and, third, to operate as a bill of discovery.

The Legislature evidently sought to provide a means whereby a litigant's rights would be preserved in a case the exigencies of which would prevent him from producing his testimony in court in the regular way; to compel the production of testimony that might be forever lost, and to afford an opportunity to the litigant to secure evidence of facts necessary to make out his case, which evidence was peculiarly within the knowledge, or if documentary, in the possession and control of his adversary.

Under these enactments the litigant is entitled to these rights as a matter of law. He undertakes to assert them. Notices are regularly served to take depositions of the officers of an adversary corporation. Subpoenas are regularly served. One officer appears in obedience to his subpoena, and refuses to testify. Two other officers refuse to appear. The litigant requests the notary to fine or commit the recalcitrant witnesses under such circumstances, and the notary flatly refuses to either fine or commit—must the litigant stop here and proceed anew before another notary or can he not resort to a court of record and by mandamus compel the notary to do his duty?

The witness is given the right to have the assessment of his fine or his commitment inquired into by a court of competent jurisdiction. Is the door of the law closed to the litigant?

We are not holding Section 11512, General Code, to be a mandatory statute, as it is not necessary so to do in this case.

The plaintiff in the action in which it was sought to take these depositions was not at all modest in her demands. The subpoenas *duces tecum* did call for the pro-

duction of a mass of testimony, but it must be remembered that this is an action alleging fraudulent conspiracy, and, from the allegations of the petition, the range of the testimony was necessarily large.

The allegations of this petition are sufficient to authorize an inspection of all records, documents and correspondence of the Woolson Spice Company from the time Hermann Sielcken became connected with the corporation until his death. This would include evidence of inducement whereby he was encouraged to connect himself with the corporation, if such evidence existed, as well as evidentiary matter since his death that lent light to the alleged fraudulent transactions during his lifetime.

In the absence of any question of privilege, we do not regard the scope of these subpoenas as unreasonably comprehensive, or that they constitute unlawful search and seizure.

Clara Sielcken-Schwarz as widow and sole residuary legatee of Hermann Sielcken, deceased, upon the refusal of his personal representative to institute the action, had full right and capacity to file and maintain the action brought by her. To hold otherwise would be to place heirs, legatees and devisees at the mercy of capricious administrators, executors and trustees. On this proposition we are content with the authorities cited by the learned Court of Appeals which heard the case: 24 Corpus Juris, 797, Section 1981, 11 Ruling Case Law, 262, Section 297; 22 L. R. A. (N.S.), 458, note; and 20 Ann. Cas., 96.

Whether the petition is demurrable, or that the action is barred by the statute of limitations, or Clara Sielcken-Schwarz should not prevail in her suit because

of laches, furnish no plausible pretext, and certainly no defense to Bevan, Koehrman and Stranahan for the disobedience of the orders of their subpoenas, in the face of Section 11526, General Code, which provides, in substance, that depositions may be taken at any time after the service of summons.

The right to examine these relators, either orally or by deposition, as upon cross-examination, is statutory, and its exercise does not necessarily constitute a "fishing expedition." Neither of these sections is in contravention of the federal or state Constitutions.

The fact that all parties defendant were not served with summons when their depositions were sought to be taken can make no difference so far as the relators are concerned, if they have been so served.

The contention that the notary who committed the relators was disqualified because of interest is not tenable, and does not come within the purview of Tumey v. Ohio, 273 U. S., 510, 47 S. Ct., 437, 71 L. Ed., 749, 50 A. L. R., 1243.

The review of the action of the notary in committing relators as provided by Section 11514, General Code, afforded them due process. In addition, the right and opportunity to object to any and all testimony taken by the notary, as being irrelevant, incompetent, or privileged, was preserved to them in the trial court, and they had due process of law.

It has been heretofore held by this court that a notary public, in committing a witness to jail for refusing to answer questions, and in issuing an attachment for a witness who disobeys the order of his subpoena, does not exercise judicial power, and we see no good reason why

we should depart from this long-established rule: DeCamp v. Archibald, 50 Ohio St., 618, 35 N. E., 1056, 40 Am. St. Rep., 692; Benckenstein v. Schott, Sheriff, 92 Ohio St., 29, 110 N. E., 633.

These cases are likewise sufficient answer to the claim that Sections 11510, 11511 and 11512, General Code, are violative of the state and federal constitutions in denying due process of law.

We find no prejudicial error in the record of any of these cases, and the judgment of the Court of Appeals in each and all of them is affirmed.

Judgments affirmed.

Day, Allen, Jones and Matthias, JJ., concur.

Weygandt, C.J., and Kinkade, J., not participating.